Supreme Court, U.S.
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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DETECTIVE McCOMISKEY and POLICE OFFICER O'BRIEN,

Petitioners,

-against-

CARLOS SOBA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 20, 1991.

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit, in affirming the District Court's determination that petitioners Detective McComiskey and Police Officer O'Brien were not entitled to qualified immunity based upon the jury's reasonable inference that these two officers acted maliciously or wantonly in using excessive force to effect respondent Carlos Soba's arrest, misapply the doctrine of qualified immunity as enunciated by this Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), in light of Soba's own version of the events to which he testified, the undisputed facts, Soba's failure to articulate or demonstrate what lesser degree of force or other lesser measures could or should have been taken, or what amount of force would have been objectively reasonable at that distance of 8-10 feet, in that time sequence of a matter

of seconds, and against an illegally defaced, sawed-off shotgun over one foot in length, wielded by a suspected felon surrounded by police officers in the course of fleeing from the scene of an armed robbery to which these officers had been summoned?

2. In affirming the determination that Detective McComiskey and Police Officer O'Brien used excessive force, did the Second Circuit properly apply the "objective reasonableness" standard articulated by this Court in Graham v. Connor, 490 U.S. 386 (1989)?

PARTIES

The parties in his case at the time it was commenced were as follows:

1. Carlos Soba, plaintiff,

2. Detective McComiskey, defendant.

3. Police Officer O'Brien, defendant.

4. Sergeant McGoey, defendant.

5. Police Officer Blackwell, defendant.

6. Police Officer Langan, defendant.

7. New York City Police Department, defendant.

8. City of New York, defendant.

The petitioners are parties 2 and 3, defendants below.

The respondent is party 1, plaintiff below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Detective McComiskey and Police Officer O'Brien respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-titled proceeding on May 24, 1991.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit, dated May 24, 1991 is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Southern District of New York, dated October 17, 1990 is reported at 748 F. Supp. 227 (S.D.N.Y. 1990). A copy is reprinted in the Appendix at page 10. The opinion of the United States District Court for the Southern District of New York, dated May 9, 1990 is reprinted in the Appendix at page 27.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered May 24, 1991. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). This petition has been filed within the time allowed by law,

pursuant to Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

AMENDMENT IV - SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

NEW YORK PENAL LAW

§35.15(2)(a)(ii)

§35.15 Justification; use of physical force in defense of a person

* * *

> 2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:
>
> > (a) He reasonably believes that such other person is using or about to use deadly physical force. Even in such

case, however, the actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating; except that he is under no duty to retreat if he is:

* * *

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; . . .

§35.30(1)(c)

§35.30 Justification; use of physical force in making an arrest or in preventing an escape

1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person form what he reasonably believes to be the use of imminent force of physical

force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

* * *

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

STATEMENT OF THE CASE

On March 12, 1982, respondent Carlos Soba, along with other felons, robbed at gunpoint more than 30 patrons of Emmi's Bar in Brooklyn, New York (113-14, 151, 209, 629).[1] During the armed robbery, a silent alarm was triggered, summoning various police officers, including petitioners Detective McComiskey and Police Officer O'Brien, who with defendant Sgt. McGoey fired a total of 14 shots and apprehended Soba as he was fleeing the scene of the crime and approaching the police head-on wielding a loaded, operative, sawed-off shotgun over one foot in length (211). Soba was tried and convicted along with his co-felon, Edwin Valles, while a third felon

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[1] Numbers in parentheses refer to pages in the Joint Appendix filed by petitioners in the United States Court of Appeals for the Second Circuit.

who accompanied Soba and Valles escaped (112, 267, 275-76). On July 25, 1988, the New York Supreme Court, Appellate Division, Second Department affirmed Soba's criminal conviction of robbery in the first degree (12 counts) and robbery in the second degree, concurring with Soba's counsel that no meritorious issues could be raised on appeal. 142 A.D.2d 744 (2d Dep't 1988). At the time Soba robbed Emmi's Tavern, he was on parole for burglary, another felony (208, 216).

Soba filed a pro se civil rights complaint in the United States District Court for the Southern District of New York, on or about October 11, 1983, seeking damages in the sum of $3,000,000 for "unreasonable and unjustified harm" (15-17). Soba's appointed pro bono counsel filed an amended complaint on or about November 27, 1984, alleging that

Soba "was without just cause, shot five times by the Police Defendants" (25-26).

Defendants moved for summary judgment on or about April 27, 1989, alleging, inter alia, that Soba's excessive force claim must fail as a matter of law, and the police officers were entitled to qualified immunity (40). By order entered May 9, 1990, the District Court granted the summary judgment motion on consent as to defendants Blackwell, Langan, the Police Department and the City of New York, and denied the motion as to the remaining three police officer defendants (McGoey, McComiskey and O'Brien), on the grounds that "issues of fact remain to be decided by a jury with respect to the reasonable use of force under the circumstances claimed by plaintiff," and that Soba's "credibility must be ascertained

by a jury and not by the Court" (A27).[2] On June 8, 1990, defendants McGoey, McComiskey and O'Brien filed a notice of appeal from the May 9, 1990 order denying summary judgment and qualified immunity, which interlocutory appeal was withdrawn by stipulation of the parties and so ordered by the Court of Appeals following the conclusion of the trial.[3] The trial was held on three days, August 1, 2 and 3, 1990, in the United States District Court for the Southern District of New York, before Judge Patterson and a jury.

---

[2] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix to this petition.

[3] Defendants' motions to stay the trial pending appeal from the denial of summary judgment on qualified immunity grounds were denied by the District Court on June 18, 1990, and by the Court of Appeals on July 17, 1990.

a. Why the police officers used deadly force to apprehend Carlos Soba.

On the evening of March 12, 1982, CARLOS SOBA robbed Emmi's Tavern in Brooklyn, New York, along with Edwin Valles and some of his friends (113-14). At the scene of the robbery, Soba was given a loaded shotgun about 12-14 inches in length (114, 141, 190-91, 211). When he was inside the bar with his co-felons, he displayed the shotgun inside his jacket, and removed money from the cash register and put it in his pocket, while the people inside the bar were lying lay on the floor (115-16, 141, 142, 146, 209-10). After he took the money, he noticed his friends had apparently departed, and he went outside the bar, where he took the shotgun out of his pants and planned to throw the shotgun away and "surrender" if he encountered police (116, 141, 147, 148, 150, 154, 158, 210, 212). He walked down the street toward the car

parked on 40th Street, holding the shotgun in a 45-degree angle from the lower chest area on the right side to the shoulder area on the left side, with the barrel of the gun about 2-3 inches above his left shoulder, the handle of the gun on his right side, and the muzzle up (117-18, 149-51, 154, 210-11). The top of the shotgun was above 3-4 inches from his left shoulder (211).

Soba stopped walking down Second Avenue, from 39th Street to 40th Street, when he saw the sergeant in uniform on the corner, in a crouched position facing away from Soba and pointing a revolver toward 40th Street (118-20, 159-60, 179, 180). Soba froze and watched the sergeant for about five seconds, until the policemen who were behind him shouted to the sergeant that Soba was behind him (120, 159, 160, 163, 180, 181). The sergeant then turned toward Soba and shot him in the stomach

(130, 177, 180, 214). After Soba felt the bullet, he said "Que pasa? I surrender" (A120, A177, A178, A212-13). Soba felt another shot in his hand, and then the officers in back started shooting (120, 214). Soba apparently turned in a counterclockwise position after a bullet hit him in the shoulder (214-15), and continued to hold his gun against his chest in the same position (121, 179, A214), without throwing the shotgun down or placing it on the ground because it could have exploded or "gone off," causing injury to the policemen or himself (160-62, 163, 182), and because if he had moved, the police "officers might have imagined that [he] was going to use the shotgun against them . . ." (182-83). After he was wounded, Soba fell to the ground, still holding the gun with his right hand (122). The sergeant then kicked the shotgun with his foot, placed it on the

ground next to Soba, and handcuffed Soba's hands behind his back, after which he was taken by ambulance to the hospital for treatment of his bullet wounds (122-24).

DR. WILLIAM STAHL reviewed Soba's medical records, which described six gunshot wounds to the right leg, superficial abdomen, left shoulder and left forearm, and medical treatment for the injuries (239-43, 427, 432). Dr. Stahl explained that a shotgun load (ranging from nine pellets to one hundred pellets) sticks together for about 8-10 feet, and then spreads out into a big pattern by 20 or 30 feet (245). At close range, if the load hits as one batch of shell, there can be tearing of tissue and tremendous life damage (245). On a sawed-off shotgun, the sawing off of the barrel allows the load to spread faster, depending upon the distance from the muzzle (245-46). A distance of 10 feet from a

sawed-off shotgun is relatively close to the muzzle, which can cause serious tissue damage, serious injury to a lung or other organs, or death (246-47).

POLICE OFFICER MARVIN BLACKWELL, assigned with Sgt. McGoey to the 4:00 p.m. to 12 midnight tour of duty, responded as a backup unit on March 12, 1982 to a police radio report of a robbery in progress (249-50). After stopping and exiting the marked radio patrol car, Blackwell saw a male run out of the bar with a shotgun in his hand (251-52). When the male stopped and pointed the shotgun at Blackwell, Blackwell fired two bullets at him, after which the man dropped the shotgun and ran away toward 40th Street (252-53).

Blackwell then saw two other males come out of the bar, one of whom was Soba with a shotgun in his hand, who began running down Second Avenue after seeing Blackwell

(253-54). Sgt. McGoey was one block away on the corner of 40th Street, about 500-600 feet away (261), and Blackwell yelled down the block to him that there were two more coming behind him and that one had a shotgun (253, 254, 263). Blackwell took cover behind a parked car, and a few seconds later he heard gunshots (253).

As SERGEANT ANDREW McGOEY walked with Officer Blackwell toward the bar, he saw an individual come out of the bar and turn and point a shotgun at Officer Blackwell (266-67). Blackwell fired two shots at him, and the individual turned and ran while McGoey pursued him on foot, stopping at the corner of 40th Street and Second Avenue to use the building line as cover (267).

McGoey heard someone yelling behind him, and turned to see two individuals come up behind him, one of whom was Soba

holding a shotgun in his hand and running toward McGoey (267, 281, 282). Soba was approximately 10 feet away, and was holding the shotgun about waist level as he ran, with his right hand in the trigger area and left hand on the barrel at waist level, and the gun pointing off to his left side about 45 degrees from the hip (267-69, 273). As McGoey turned to face Soba, who was then approximately 8 feet away, Soba brought his gun up to about chest level at a 90-degree angle, and pointed it at McGoey (267-69, 274, 275). McGoey yelled for Soba to "drop it," and fired six rounds from his revolver (267, 269). Soba then twisted to his right in the direction of 40th Street and Second Avenue (269-70). As McGoey was firing, he noticed simultaneous flashes out of the corner of his eyes, and realized the anti-crime unit, with McComiskey, O'Brien and Langan, had pulled up to the scene and

were also firing (270). Soba fell backwards into a sitting position with the shotgun laying in his lap (270). McGoey ran over, disarmed Soba by kicking the gun out of his hand, and secured the shotgun (270, 277). Soba's unarmed cofelon was later arrested up the block by other police officers (275-76). McGoey estimated that the entire incident, from the time he first saw Soba until he disarmed him, lasted a matter of seconds (278). McGoey was not wearing a bullet-proof vest at the time (274-75).

DETECTIVE THOMAS McCOMISKEY, assigned to an anti-crime unmarked car on March 12, 1982, and responding to two radio reports of a holdup in progress and "assist police officers, shots fired," observed a police officer chasing an unknown male, and then Soba coming up behind McGoey, with a sawed-off shotgun extended out in front of him in a firing position (301-03).

McComiskey heard McGoey scream "Drop it," and saw the flashes as McGoey fired his gun (303). McComiskey exited the vehicle with his gun in his hand (302-03). Soba, who was about 8 feet away from McComiskey, "did a complete 90-degree turn and faced" McComiskey, who then fired all six shots in his revolver (303-05, 308). McComiskey fired the six shots in under two seconds, and the entire incident during which shots were fired lasted no more than four seconds (309). Soba never indicated, either by words or by gestures, that he was surrendering (305). Detective McComiskey described a sawed-off shotgun as a deadly, illegally defaced weapon, commonly used for violent street crimes, and usually illegally possessed, which can have a deadly effect when used on an individual (304).

POLICE OFFICER THOMAS O'BRIEN was in the unmarked car with Police Officer

Langan and Detective McComiskey, when they received the radio calls of a robbery in progress, and then a "1013," which means "assist police officer" and "shots fired" (340-42). O'Brien observed McGoey and Soba facing and pointing guns at each other, about 8-10 feet apart, on the sidewalk of 40th Street and Second Avenue (342). Soba was holding a sawed-off shotgun about chest level, with the barrel of the gun facing toward McGoey (342). As O'Brien exited the car, McGoey fired his weapon at Soba, and Soba then turned toward O'Brien, who yelled for Soba to drop the gun (342-43). O'Brien discharged two shots at Soba, who fell after the second shot (343, 344, 354). O'Brien did not hear Soba say anything (343), and discharged his weapon almost simultaneously as he exited the vehicle (343).

A second individual ran off toward Third Avenue, and O'Brien chased him after

Soba fell, apprehending him about three-quarters up the block (343-44). O'Brien had three bullets remaining in his gun, but did not discharge his gun at the second perpetrator because he did not see a weapon or perceive any threat from him (345).

b. The Jury Verdict.

The jury rendered a verdict in favor of McGoey and against McComiskey and O'Brien, and awarded Soba $60,000 in compensatory damages. The jury responded to special interrogatories (411-14):

> 1. A. Did plaintiff prove by preponderance of the evidence that Andrew McGoey used excessive force in effecting the plaintiff's arrest?
>
> Answer: No.
>
> B. Did plaintiff prove by preponderance of the evidence that Thomas O'Brien used excessive force in effecting the plaintiff's arrest?
>
> Answer: Yes.

C. Did plaintiff prove by preponderance of the evidence that Thomas McComiskey used excessive force in effecting the plaintiff's arrest?

Answer: Yes.

2. What amount of money would reasonably compensate plaintiff for his past pain and suffering?

Answer: $30,000.

3. What amount of money would reasonably compensate plaintiff for his future pain and suffering?

Answer: $30,000.

4. Do you find that any of the defendants, with regard to whom you answered YES in Question 1, acted maliciously or wantonly?

Answer: Yes.

5. What amount of money, if any, do you award the plaintiff in terms of punitive damages?

Answer: $0.

c. The District Court's Opinion

In denying McComiskey's and O'Brien's motion for a directed verdict, for judgment notwithstanding the verdict, or alternatively

for a new trial, the District Court concluded that there was sufficient evidence to support the jury's verdict (A10-26). After reviewing the evidence adduced at trial, the District Court found that the testimony conflicted as to the direction Soba turned when the shot hit him in the shoulder, in that Soba claimed he turned counterclockwise and thus away from McComiskey and O'Brien, whereas the police officers all testified that he turned clockwise towards McComiskey and O'Brien (A21-22). Although Dr. Stahl never testified as to the sequence of the shots, the effect of the force of the bullets on Soba's body, how his body turned after he was shot, or the direction from which the bullets supposedly entered Soba's body, the District Court nevertheless concluded that Dr. Stahl's testimony corroborated Soba's testimony as to how his body turned, since the Court concluded that four of the five

bullets of a nonsuperficial nature hit Soba in the left side (A22-23). The Court then concluded that in light of this evidence, the jury accepted McGoey's testimony that he fired in self-defense, but rejected the testimony of McComiskey and O'Brien that they fired in self-defense. Since McComiskey and O'Brien did not testify that they were firing to protect McGoey, but rather, testified that Soba was threatening them and was no longer facing McGoey, the Court found no need to address that issue in its opinion (A23). The Court then found:

> Having concluded that there was sufficient evidence for the jury to reject McComiskey and O'Brien's testimony that they fired in self-defense with Soba's sawed-off shotgun pointed at them, it was permissible for the jury to infer that their testimony was developed to cover a failure on their part to act properly (A23).

The Court concluded that the jury, with its ample opportunity to assess Soba's

credibility, could permissibly deduce that excessive force had been used,

> particularly if it concluded that Soba's back was to McComiskey and O'Brien, that he had been wounded at least three times by McGoey, and he had turned counterclockwise from McGoey and was no longer a threat to him (A24).

The Court further denied qualified immunity, holding:

> In view of the jury's disbelief in the defendants' testimony and other evidence, the jury could have reasonably inferred that McComiskey and O'Brien acted maliciously or wantonly, with the result that defendants are not entitled to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 816-817 (1982) (A24-25).

The District Court accordingly denied McComiskey's and O'Brien's motion (A25), and entered judgment on February 4, 1991 in favor of Soba and against McComiskey and O'Brien (A6-9).

d. The Court of Appeals' Decision.

In a summary order dated May 24, 1991, the United States Court of Appeals for the Second Circuit affirmed the District Court judgment (A1-5). The Court noted that to establish an excessive force claim, a plaintiff must demonstrate that the police officer used "objectively unreasonable" force under the circumstances with which he was confronted, and that disregarding McComiskey's and O'Brien's underlying intent and motivation, the jury could have permissibly rejected their claims that they fired in self-defense (A3). The Court also concluded that the facts further supported the jury's different conclusions with respect to the objective reasonableness of the force used by Sergeant McGoey, and that used by Detective McComiskey and Officer O'Brien (A3-4).

The Court further held, without analysis, reasoning or explanation, that McComiskey and O'Brien were not entitled to qualified immunity, in that the Court believed that the record supported such a conclusion (A4). The Court of Appeals accordingly affirmed the District Court judgment in its entirety (A5).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' ruling that McComiskey and O'Brien were not entitled to qualified immunity as a matter of law with respect to Soba's excessive force claim conflicts with the decisions of this Court and other Circuits.

The Court of Appeals' holding in this case imposes an impossible standard upon police officers who must face and apprehend armed and dangerous fleeing felons: either they must be shot at first before being permitted to fire their weapons; or they must risk serious physical injury or death because they must perceive in a matter of seconds that a felon fleeing the scene of a violent crime, who makes no attempt to surrender before he is first shot and faces police with a loaded sawed-off shotgun which he does not drop even after he is shot, is somehow no longer a threat to them; or they must risk civil liability for firing their weapons to defend themselves or others

against the threat of imminent deadly force. Soba has failed to demonstrate that these police officers' use of force in this case was "objectively unreasonable," or that any lesser degree of force than that utilized here would have been objectively reasonable under these circumstances. Soba presented absolutely no evidence as to what the appropriate response or use of force should have been in this case, or what lesser protective measures than those undertaken by these officers would have been sufficient to defend against the threat of an armed fleeing suspected robber.

The District Court's and Court of Appeals' rulings in this case improperly second-guessed, with the luxury of hindsight in the relative peace of a courtroom and judges' chambers, the actions of these police officers, who by all accounts faced a sawed-off shotgun in the hands of a

fleeing felon, and were forced to respond to the dangerous, life-threatening situation in the blink of an eye, with only a split-second to make the crucial decision. In any other similar scenario, underestimating the danger and amount of force necessary to prevent it, as the Court of Appeals and District Court required, could mean the difference between the police officers' life and death, a rather significant hazard from which the judges and jury were spared when making their decision in this case.

(1)

This Court has not yet addressed or determined the extent of the availability or the applicability of qualified immunity to claims alleging use of excessive force or deadly excessive force. In Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865, 1873 n.12 (1989), case involving an excessive force claim where the issue of qualified

immunity was not raised, this Court reserved judgment on the issue, noting that "the officer's objective 'good faith' -- that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment -- may be relevant to the availability of the qualified immunity defense to monetary liability under §1983" (emphasis in original); see also Slattery v. Rizzo, __ F.2d __, n.4 (4th Cir. July 25, 1991) (Powell, J., United States Supreme Court Associate Justice (Retired), sitting by designation). Most Circuit Courts have applied qualified immunity to excessive force claims, or have ruled on such claims in the context of assertions of qualified immunity. See, e.g., Finnegan v. Fountain, 915 F.2d 817, 822-23 (2d Cir. 1990); Rodriguez v. City of Passaic, 914 F.2d 244 (3d Cir.), aff'g 730 F. Supp. 1314, 1327 (D.N.J. 1990); Slattery v. Rizzo, supra, (4th Cir.

July 25, 1991); Mouille v. City of Live Oak, 918 F.2d 548, 551 (5th Cir. 1990); Jackson v. Hoylman, 933 F.2d 401 (6th Cir. 1991); Fitzgerald v. Patrick, 927 F.2d 1037, 1038 (8th Cir. 1991); Thorsted v. Kelly, 858 F.2d 571 (9th Cir. 1988); Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990); Clarke v. Evans, 840 F.2d 876, 881-82 (11th Cir. 1988).

(2)

The Court of Appeals, in affirming the District Court's conclusion that McComiskey and O'Brien were not entitled to qualified immunity, based upon the jury's reasonable inference that they acted maliciously or wantonly, misapplied the doctrine of qualified immunity as set forth by this Court in Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982), which reformulated the standard for qualified immunity to eliminate its subjective components, and to focus "primarily on

objective factors" and the "objective legal reasonableness" of the official action. The jury's inference as to malice, whether reasonable or not, or the officers' subjective beliefs, should not have been dispositive of their entitlement to qualified immunity, which generally turns on the "objective legal reasonableness" of the action. See Anderson v. Creighton, 483 U.S. 635, 639, 641 (1987) (in qualified immunity analysis, Harlow sought to minimize inquiry into official's subjective intent; law enforcement officer's subjective beliefs about lawfulness of warrantless search are irrelevant); see also Whitmore v. Arkansas, __ US __, 110 S. Ct. 1717, 1735 (1990) (Harlow abandoned subjective element of qualified immunity defense, to replace the inquiry into subjective malice with an objective inquiry into the legal reasonableness of the official action); Davis v. Scherer, 468 US 183, 191

(1984) (Harlow rejected the inquiry into state of mind in favor of a wholly objective standard; qualified immunity depends upon the objective reasonableness of an official's conduct, and no other "circumstances" are relevant to the issue of qualified immunity). Thus, in determining qualified immunity, the relevant inquiry in this case should have been not whether McComiskey and O'Brien acted maliciously in shooting at Soba, but rather, whether they could have objectively and reasonably believed that the force used was necessary under the circumstances and did not violate Soba's Fourth Amendment rights.

Moreover, although the District Court found the jury's determination to be relevant to the issue of qualified immunity, there is a conflict among the Circuits as to whether qualified immunity is ultimately a legal determination for the Court, or an issue to

be submitted to and resolved by the jury. Compare, e.g., Slattery v. Rizzo, supra ("the purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury"); Finnegan v. Fountain, supra, 915 F.2d at 821 ("Once disputed factual issues are resolved, the application of qualified immunity is, however, ultimately a question of law for the Court to decide"), and Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir.), cert. denied, 111 S. Ct. 431 (1990) ("The ultimate legal determination whether, on the facts found, a reasonable police officer should have known he acted unlawfully is a question of law better left for the court to decide"), with Thorsted v. Kelly, supra, 858 F.2d at 576 (9th Cir. 1988) (district court did not err by submitting qualified immunity

instruction to the jury), and Street v. Parham, 929 F.2d 537, 540 (10th Cir. 1991) (once the jury concluded that excessive force had been used, the inquiry as to objective reasonableness was over; the qualified immunity question was answered as part of the jury's consideration of the excessive force claim).

(3)

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of legal rules that were "clearly established" at the time the action was taken. Anderson v. Creighton, supra, 483 U.S. at 639, citing Harlow, supra, 457 U.S. at 818-19. The relevant inquiry is whether it was objectively reasonable for the police officers to believe that their use of force

under the circumstances was reasonable and lawful, and did not violate plaintiff's rights, in light of clearly established law and the information available to the officers at that time. Anderson v. Creighton, supra, 483 U.S. at 641. A police officer should prevail on qualified immunity grounds if a reasonable officer possessing the same information could have believed that his conduct was lawful. Id. Thus, if a reasonable officer could have found probable cause to believe that Soba presented a serious threat of personal harm to the officers at the time McComiskey and O'Brien pulled the trigger, then these officers should be entitled to qualified immunity as a matter of law. See Slattery v. Rizzo, supra. Where there is a legitimate question as to whether the police officer's conduct would objectively violate the plaintiff's right, qualified immunity affords police officers the necessary latitude to

pursue their duties without having to anticipate, on the pain of civil monetary liability, future refinements or clarifications of constitutional law. Id. Qualified immunity protects all such officials unless the law clearly prohibited the action. Id., citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

A defendant's conduct may in fact violate a plaintiff's civil rights under §1983, but the defendant may be qualifiedly immune from individual liability if the defendant's conduct was objectively reasonable in light of clearly established law at the time of the conduct. See, e.g., Mouille v. City of Live Oak, supra, 918 F.2d at 551. Thus, even if an officer used force that was objectively unreasonable under Graham, he or she may be protected by qualified immunity if he or she reasonably believed, based upon the facts and circumstances, that the force used

was lawful. Merzon v. County of Suffolk, ___F. Supp. ___ (E.D.N.Y. June 17, 1991). "In sum, although an officer's conduct may be 'objectively unreasonable' under the Fourth Amendment analysis of Graham, he or she may nonetheless be entitled to a cloak of qualified immunity against personal liability under the Harlow standard." Id. Inevitably, in some cases, police officers will be mistaken about the necessary use of force, but where they have acted in a manner which they reasonably believe to be lawful, they should not be held personally liable.[4] See Anderson v. Creighton, 483 U.S. at 641.

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[4] But see Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991) ("in excessive force claims asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry. This is because, in the excessive force context, the Fourth Amendment inquiry

(Footnote Continued)

To determine whether the law McComiskey and O'Brien allegedly violated was clearly established, or whether it was objectively reasonable for them to mistake the need for the force used at that time, the relevant focus is the law as it existed in 1982, the time of these officers' actions. The existence of state statutes in effect in 1982 is relevant to the officers' entitlement to qualified immunity.[5] See Davis v. Little,

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(Footnote Continued)
asks directly whether the police officer reasonably could have believed that the force was necessary under the circumstances").

[5] Inasmuch as the Second Circuit had determined that qualified immunity is an issue of law to be decided by the Court, see Finnegan v. Fountain, supra, 915 F.2d at 821, petitioners' legal argument with respect to New York Penal Law §§35.15(2)(a)(ii) and 35.30(i)(c) was not presented as evidence to the jury, since these statutory provisions in effect at the time of the incident relate to the legal determination of the officers' entitlement to qualified immunity, rather than to any factual determination by the jury of excessive force. These statutes were
(Footnote Continued)

851 F.2d 605, 610 (2d Cir. 1988); see also Estate of Jackson v. City of Rochester, 705 F. Supp. 779, 783-84 (W.D.N.Y. 1989).

Not only were Soba's rights as to the degree of force to be used not clearly established in 1982, as Soba was concededly an armed felon fleeing the scene of a robbery and facing police officers wielding a loaded, operable sawed-off shotgun, but it was also certainly objectively reasonable for these officers to believe that their actions, in shooting to protect themselves and others, did not violate whatever "clearly established" rights Soba had. New York law in effect at the time of this incident provided justification for the use of deadly force where, as here, a police officer had

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(Footnote Continued)
properly raised in support of the officers' qualified immunity argument in their motion for a directed verdict or judgment notwithstanding the verdict (653-54, 698-99).

reasonable cause to believe that a suspect posed a threat of serious physical harm to himself or others. New York Penal Law §35.15(2)(a)(ii), amended in 1980 to expressly include police officers, provides that a police officer may use deadly force upon another person if he "reasonably believes that such other person is using or about to use deadly physical force." Similarly, New York Penal Law §35.30(1)(c) provides that in the course of effecting or attempting to effect an arrest, a police officer may use deadly force if he "reasonably believes that ... the use of deadly physical force is necessary to defend the police officer . . . or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force." Soba has not demonstrated that these Penal Law provisions are unconstitutional either on their face or as

applied to the circumstances at bar, where these officers had objective reasonable cause to fear serious physical harm from an armed felon fleeing the scene of an armed robbery, and were confronted with a life-threatening situation on a darkened street at night, at a time when shots had already been fired.

Soba's own version of the events demonstrates that he and others robbed a bar in Brooklyn on the evening of March 12, 1982; he held the 12-14 inch sawed-off shotgun in his hands when he exited the bar after taking money from the cash register, and planned to throw the shotgun away if he encountered police officers; he proceeded down Second Avenue holding the shotgun in his hands, and observed McGoey in uniform on the corner of Second Avenue and 40th Street, facing and pointing a revolver toward 40th Street; McGoey did not see Soba from that position; Soba froze and watched

McGoey for about five seconds, until he heard the police behind him yell to the sergeant that Soba was behind him; Soba did not say anything, or attempt to surrender, before McGoey turned and shot him in the stomach; Soba said, "Que pasa? I surrender," because he had been shot in the stomach, and did not say anything until after he felt the bullet; when the first officer shot, the other officers behind Soba started to shoot; Soba continued to hold the gun against his chest in the same position, and did not throw the shotgun down, because it could have exploded or "gone off," causing injury to the policemen or himself, and the "officers might have imagined" that Soba was going to shoot at them; Soba never let go of the shotgun, even after he fell to the ground; and Soba was not shot at any time after he fell to the ground.

It is thus undisputed that as Soba was leaving the scene of an armed robbery in a crowded bar, carrying the loaded, sawed-off operative shotgun in plain view and in a position from which it could readily and quickly be lowered, aimed and fired, he came up behind McGoey, whose back was turned watching for another escaping previously armed felon, and who did not see Soba. Soba knew police officers were behind him, and heard them shout to McGoey that Soba was behind him. Soba, who faced officers from about 8 feet away with the sawed-off shotgun in his hands, ready to shoot, for at least five seconds, did not say anything, or indicate by words or actions that he was surrendering, before he was first shot, even though he testified that he would have thrown the shotgun away had he seen police officers outside the bar. Soba continued to hold the shotgun in the same

position even after he was shot and fell to the ground, and no shots were fired after Soba fell to the ground, still holding the sawed-off shotgun. In fact, O'Brien only fired at Soba twice, with three bullets left in his gun. Moreover, Soba's co-felon Valles, who was unarmed, was apprehended up the block without being shot, and the other armed co-felon escaped and was not shot at after he dropped the gun and fled.

The time sequence in which all the shots were fired was undisputably within 2-4 seconds, as Detective McComiskey testified, within "a few seconds," as Officer Blackwell observed, within "seconds," as Sergeant McGoey testified, and virtually "simultaneously," as both Sergeant McGoey and Officer O'Brien described. Also undisputed is that Soba never indicated by physical actions that he was surrendering; he never raised his arms above his head in a

gesture of surrender, or dropped his shotgun or threw it down when he encountered the police, which he testified he would have done had he wished to surrender. In fact, Soba stood with the 12-14 inch sawed-off shotgun in his hands for a full five seconds behind McGoey, without McGoey seeing him, and continued to hold the shotgun in the same position even after he was shot. Soba, by his own testimony, was about 8-10 feet away from these police officers, wielding a loaded, operative sawed-off shotgun, and it is now undisputed that it was at least objectively reasonable for McGoey, who shot at Soba only a split-second before McComiskey and O'Brien started shooting at Soba, to believe McGoey was in danger. Moreover, Soba never testified that he was shot in the back, nor did any medical evidence indicate or demonstrate that he was shot in the back or

that any of the bullets entered his body from the back. Finally, given the split-second nature of what transpired, it would have been impossible for McComiskey and O'Brien to ascertain, in virtually the blink of an eye, after shots had been fired, whether Soba or McGoey or one of the other officers had fired the initial gunshots, or whether Soba or the police had already been hit by gunfire, or whether Soba was in fact attempting to surrender, as he testified.

Soba made absolutely no attempt to articulate or demonstrate what lesser degree of force, or other lesser measures, could or should have been taken in this case, or what degree of force would have been objectively reasonable at that distance of 8-10 feet, in that time sequence of a matter of seconds, and against that illegally defaced weapon in the hands of a felon fleeing from the scene of an armed robbery to which these officers

had been summoned. Without demonstrating, through expert testimony or otherwise, that any other lesser or different action would have sufficed or have been "objectively reasonable" under the rapidly evolving circumstances which required these officers to make a spilt-second judgment, the jury had no basis upon which to conclude or infer that McComiskey and O'Brien used excessive force (by firing a total of 8 shots from their service revolvers virtually simultaneously or within a split-second after McGoey fired all 6 shots in his revolver), or that their use of force was objectively unreasonable.

In light of the undisputed evidence, and drawing all reasonable inferences from it in favor of Soba (including the District Court's inferences that Soba's back was to McComiskey and O'Brien, he had been wounded at least three times by McGoey, and he had turned counterclockwise from

McGoey), it was still objectively reasonable for McComiskey and O'Brien to believe that their use of deadly force within seconds of McGoey's six shots did not violate Soba's rights, just as McGoey was found justified in so believing, in that they all had probable cause to believe that Soba, who had not dropped the shotgun or physically indicated or gestured in any that way he had already been shot or was in the process of surrendering, posed a real or imminent threat of death or serious bodily injury to themselves or others. At the very least, officers of reasonable competence could certainly have disagreed as to whether such force was necessary, or whether some means less drastic than the use of a service revolver would or could have sufficed under these circumstances. Soba never cited any constitutional requirement that police officers faced with the imminent threat of deadly

force against them or others should not respond with deadly force, where objectively reasonable to do so. The Constitution does not require police officers to use a minimum of violence when attempting to stop a suspect from using deadly force against police officers or others, as such a requirement would expose police officers to unnecessary risks. Requiring police officers to take unnecessary risks in the performance of their duties is unreasonable. See Terry v. Ohio, 392 U.S. 1, 23-24 (1968).

Accordingly, the Courts below erred in failing to conclude that Detective McComiskey and Police Officer O'Brien not only acted objectively reasonably in view of the imminent potential threat to their lives and the lives of others around them, including that of McGoey, but also did not violate any clearly established federal law or Constitutional right of Soba. Facing the

deadly threat of a sawed-off shotgun about 8 feet away, from a suspected perpetrator of an armed robbery, where shots had already been fired and no surrender was ever evident, or even attempted before the first shot was fired, McComiskey and O'Brien acted in a split-second in a tense and rapidly evolving situation, without the luxury of knowing, as the Courts below somehow concluded based upon Soba's testimony eight years after the fact, that Soba, an unknown and possibly dangerous criminal, really intended to surrender and did not really intend to shoot these officers. An objectively reasonable amount of force was used under these circumstances, entitling McComiskey and O'Brien to qualified immunity as a matter of law, and dismissal of Soba's excessive force claim.

The Court of Appeals' decision in this case also conflicts with the decisions of other

Circuits which have invoked qualified immunity to dismiss, as a matter of law on motions for summary judgment, cases involving the use of deadly force. See, e.g., Slattery v. Rizzo, supra (4th Cir. July 25, 1991); Fitzgerald v. Patrick, 927 F.2d 1037 (8th Cir. 1991); Rodriguez v. City of Passaic, 914 F.2d 244 (3d Cir.), aff'g 730 F. Supp. 1314 (D.N.J. 1990); Henry v. Perry, 866 F.2d 657 (3d Cir. 1989).

Moreover, qualified immunity, which is immunity from suit rather than a mere defense to liability, and which is effectively lost where, as here, the case is erroneously permitted to proceed to trial, see Mitchell v. Forsyth, supra, 472 U.S. at 526-27, should be determined on the basis of the District Court record as it existed at the time of the police officers' motion for summary judgment, rather than on the basis of the trial record,

since qualified immunity was appropriate as a matter of law at that pre-trial stage, and should have been granted at that time, on the summary judgment record, prior to trial. Mitchell v. Forsyth, supra; Harlow v. Fitzgerald, supra, 457 U.S. at 817-18 (qualified immunity doctrine, relying on the objective reasonableness of official conduct, permits the resolution of many insubstantial claims on summary judgment, and avoids excessive disruption of government and subjecting officials to the burdens and costs of trial and broad-reaching discovery).

(4)

Finally, in addition to the erroneous ruling on qualified immunity, the Court of Appeals' ruling upholding the District Court's conclusion that McComiskey and O'Brien used excessive force under the circumstances also conflicts with the decisions of this Court and other Circuits.

The Court of Appeals held that Soba had established his excessive force claim, and had demonstrated that the force used was objectively unreasonable under the circumstances, in that disregarding McComiskey's and O'Brien's underlying intent and motivation, the jury could have rejected their claims that they fired in self-defense, and the facts supported the jury's different conclusions with respect to the force used by McGoey and that used by McComiskey and O'Brien. The Court of Appeals in effect affirmed the District Court's ruling that

there was sufficient evidence for the jury to reject McComiskey's and O'Brien's testimony that they fired in self-defense, and that it was permissible for the jury to infer that their testimony was developed to cover their failure to act properly.

These holdings, which require consideration of McComiskey's and O'Brien's stated reasons for firing at Soba, and the jury's rejection of those reasons and inference as to the officers' lack of good faith for purposes of determining excessive force, directly conflict with this Court's opinion in Graham v. Connor, supra, 109 S. Ct. at 1871, 1872, in which this Court held that excessive force claims, deadly or not, should be analyzed under the Fourth Amendment and an objective reasonableness standard in light of the facts and circumstances confronting the officers, without regard to their underlying intent or

motivation.[6] The Courts below improperly put in issue the subjective motivation of these individual officers, which has no bearing on whether the force used was objectively unreasonable under the Fourth Amendment. See id. at 1872. Even assuming the evidence was sufficient for the jury to reject McComiskey's and O'Brien's testimony that they fired in self-defense, as the Courts below concluded, consideration of whether the officers acted in "good faith" or with good intentions, as in self-defense (as

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[6] Although the events at issue herein occurred in 1982, the Second Circuit has ruled that the Fourth Amendment reasonableness standard articulated in Tennessee v. Garner, 471 U.S. 1 (1985), governing pre-arrest claims of excessive force, is to be applied retroactively. Davis v. Little, 851 F.2d 605, 610-11 (2d Cir. 1988); see also Dixon v. Richer, 922 F.2d 1456, 1461-62 (10th Cir. 1991) (applying Fourth Amendment "objective reasonableness" standard to officers' alleged conduct in incident which occurred prior to Graham).

the officers testified), or maliciously and wantonly, for the very purpose of causing harm (as the jury determined in Special Interrogatory No. 4 with respect to one or both of the officers), is simply incompatible with a proper Fourth Amendment analysis for excessive force claims. See Graham, supra, 109 S. Ct. at 1872. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor will an officer's good intentions make an objectively unreasonable use of force constitutional. Id. Rather, determining whether the force used was reasonable under the Fourth Amendment requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting

arrest or attempting to evade arrest by flight." Id. at 1871-72, citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985). Notably, the calculus of reasonableness must allow for the fact that police officers are often forced to make split-second judgments, in tense, uncertain and rapidly evolving circumstances, about the amount of force that is necessary in a particular situation. Graham, supra, 109 S. Ct. at 1872. Significantly, however, as in other Fourth Amendment contexts, the "reasonableness" inquiry in an excessive force case is an objective one, and concerns whether the officers' actions were "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Id.

Applying this standard to the force used in this case to apprehend Soba, without consideration of the police officers'

underlying intent or motivation (whether in fact prompted by good faith self-defense, as they testified, or by malice, as the jury found), it was certainly "objectively reasonable" under the Graham standard articulated by this Court for McComiskey and O'Brien to fire their revolvers at Soba, in order to stop and defend against an armed suspected felon fleeing with others, at least one of whom was also armed, from the scene of an armed robbery, surrounded by police officers about 8 feet away and wielding a loaded sawed-off shotgun. Armed robbery is certainly a severe crime, Soba certainly posed an immediate threat to the safety of the officers or others, and by his own admission, he was heading toward the getaway car and was actively fleeing the scene of the crime.

This case also presents a conflict between the Second Circuit and other Circuit

Courts that have ruled as a matter of law on the objective reasonableness of the use of deadly force. See e.g., Reese v. Anderson, 926 F.2d 494, 501 (5th Cir. 1991) (summary judgment granted for police officer's use of deadly force that killed an unarmed robbery suspect, since officer could have reasonably believed that decedent had retrieved a gun and was about to shoot); Ford v. Childers, 855 F.2d 1271, 1275 (7th Cir. 1988) (upholding directed verdict for use of deadly force against fleeing bank robber who might have been holding a gun at time he was shot, and whom police officer reasonably concluded was armed and dangerous); O'Neal v. DeKalb County, Ga., 850 F.2d 653 (11th Cir. 1988) (upholding use of deadly force against decedent who rushed at officers with a raised knife). Soba's actions in this case, which included facing police officers holding a loaded, operative sawed-off shotgun from

about 8 feet away, in the course of fleeing with other felons from an armed robbery to which these officers had been summoned, could certainly and reasonably have caused McComiskey and O'Brien to fear imminent and serious physical harm (just as McGoey was found justified in so fearing), and to use the objectively reasonable amount of force necessary to protect themselves and others from such a deadly threat.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

VICTOR A. KOVNER,
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
FRANCIS F. CAPUTO,
ELIZABETH I. FREEDMAN,
of Counsel.

*Counsel of Record

August 20, 1991.

91-308

FILED
AUG 21 1991
OFFICE OF THE CLERK

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DETECTIVE McCOMISKEY and POLICE OFFICER O'BRIEN,

Petitioners,

-against-

CARLOS SOBA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD J. KOERNER,*
FRANCIS F. CAPUTO,
ELIZABETH I. FREEDMAN,
Of Counsel.

August 20, 1991.

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DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 24, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-fourth day of May, one thousand nine hundred and ninety-one.

P r e s e n t:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE THOMAS J. MESKILL,
HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges.

CARLOS SOBA,

Plaintiff-Appellee,

v.

DETECTIVE McCOMISKEY; POLICE OFFICER O'BRIEN,

Defendants-Appellants,

SGT. McGOEY; DETECTIVE McCOMISKEY; POLICE OFFICER O'BRIEN; POLICE OFFICER BLACKWELL; POLICE OFFICER LANGAN; NEW YORK CITY POLICE DEPARTMENT; CITY OF NEW YORK,

Defendants.

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Patterson, J., entered after a jury trial, finding that defendants McComiskey and O'Brien had used excessive force in the apprehension of plaintiff Soba. McComiskey and O'Brien appeal the denial of their motion for judgment n.o.v. claiming the jury verdict was not supported by the evidence and that they were prejudiced by several rulings by the court.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED.

A motion for j.n.o.v. should be granted only when "'without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one

conclusion as to the verdict that reasonable [persons] could have reached.'" Stubbs v. Dudley, 849 F.2d 83, 85 (2d Cir. 1988) (quoting Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970)), cert. denied, 489 U.S. 1034 (1989).

To establish an excessive force claim a plaintiff must demonstrate that the police officer used force that was objectively unreasonable under the circumstances with which he was confronted. Finnegan v. Fountain, 915 F.2d 817, 823 (2d Cir. 1990) (citing Graham v. Connor, 490 U.S. 386, 397 (1989)); see Heath v. Henning, 854 F.2d 6, 8 (2d Cir. 1988). Thus, disregarding McComiskey's and O'Brien's underlying intent and motivation, the jury could have rejected their claims that they fired in self defense. The facts also support the jury's different conclusions with respect to the objective reasonableness of the force used by Sergeant

McGoey and that employed by Detective McComiskey and Officer O'Brien.

McComiskey and O'Brien were not entitled to qualified immunity. "[T]o establish the qualified immunity defense, a police officer must satisfy one of two tests: either that his conduct did not violate 'clearly established rights' of which a reasonable person would have known, or that it was 'objectively reasonable' to believe that his acts did not violate these clearly established rights." Finnegan, 915 F.2d at 823 (citing Warren v. Dwyer, 906 F.2d 70, 74 (2d Cir.), cert. denied, 111 S.Ct. 431 (1990)).

We believe the record supports the district court's conclusion that McComiskey and O'Brien were not entitled to qualified immunity.

We have reviewed the appellants' other contentions and find them equally lacking in merit.

For the foregoing reasons the judgment of the district court is affirmed.

Ellsworth A. Van Graafeiland,
U.S.C.J.

Thomas J. Meskill,
U.S.C.J.

Joseph M. McLaughlin,
U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED FEBRUARY 4, 1991

CARLOS SOBA,

Plaintiff,

- against -

SGT. McGOEY; DET. McCOMISKEY, POLICE OFFICERS O'BRIEN, BLACKWELL, LANGAN, POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Defendants.

Defendants having moved to dismiss plaintiff's civil rights action and for summary judgment; the United States District Court for the Southern District of New York, Honorable Robert P. Patterson, District Judge, having granted on May 9, 1990 defendants' motion for summary judgment on consent as to defendants Blackwell, Langan, Police Department, and the City of New York, and having denied the motion for

summary judgment as to defendants McGoey, McComiskey and O'Brien; the action as to the remaining three defendants having come on for trial before the Honorable Robert P. Patterson, District Judge, and a jury; and the issues having been duly tried on August 1, 2, and 3, 1990 before the Court and a jury; and the jury, responding to special interrogatories on August 3, 1990, having duly rendered a verdict in the sum of $60,000.00 (sixty thousand dollars) in favor of the plaintiff Carlos Soba and against defendants Thomas McComiskey ("McComiskey") and Thomas O'Brien ("O'Brien"); and the jury found in favor of defendant Andrew McGoey and against plaintiff Carlos Soba; defendants McComiskey and O'Brien, having moved to set aside the verdict, for a directed verdict in their favor, for a new trial, and for judgment notwithstanding the verdict; and the District

Court having filed its Opinion and Order denying said motion on the 17th day of October, 1990.

IT IS ORDERED AND ADJUDGED that plaintiff Carlos Soba prevailed on his claims against the defendants McComiskey and O'Brien and recover from defendants McComiskey and O'Brien the sum of $60,000.00 (sixty thousand dollars) with interest therein at the rate as provided by law from the date of entry of the judgment, and his costs of the action in an amount to be taxed; and it is further

ORDERED AND ADJUDGED that plaintiff's claims against defendants Blackwell, Langan, Police Department, City of New York and Sgt. McGoey be and the same hereby are dismissed in their entirety with prejudice; and it is further

ORDERED AND ADJUDGED that the prevailing plaintiff, Carlos Soba, will be

allowed to move this Court for a request for all attorney's fees, costs, and disbursements; and it is further

ORDERED AND ADJUDGED that the previous judgment entered on the docket in this case on December 10, 1990 be and the same hereby is vacated.

Dated: New York, New York
February 4, 1991
1:25 PM

Robert P. Patterson, Jr.
U.S.D.J.

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 2/6/91

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 17, 1990

CARLOS SOBA,

Plaintiff,

- against -

SGT. McGOEY; DET. McCOMISKEY, POLICE OFFICERS O'BRIEN, BLACKWELL, LANGAN, POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Defendants.

ROBERT P. PATTERSON, JR., U.S.D.J.

This is a motion by defendants Detective McComiskey ("McComiskey") and Police Officer O'Brien ("O'Brien") pursuant to Rule 50 of the Federal Rules of Civil Procedure for (a) a directed verdict and (b) for judgment notwithstanding the verdict and, pursuant to Rule 59 of the Federal Rules of Civil Procedure, for a new trial.

Fed. R. Civ. P. 50, 59. For the reasons set forth below, the motion is denied.

Plaintiff Carlos Soba ("Soba") brought this action pro se in 1983, alleging that several police officers had used excessive force in effecting his arrest. Motions for summary judgment were made prior to trial and were granted as to defendants Police Officers Blackwell, Langan, the Police Department, and the City of New York, but denied as to defendants Sergeant McGoey ("McGoey"), McComiskey, and O'Brien, who fired a total of fourteen shots at the plaintiff on March 12, 1982 when they were effecting his arrest for armed robbery.

A jury trial was held on August 1, 2 and 3, 1990. The jury returned a verdict in favor of McGoey and against McComiskey and O'Brien and awarded Soba $60,000 in compensatory damages. The jury found that McComiskey and O'Brien had acted wantonly

or maliciously but did not award punitive damages.

BACKGROUND

The underlying facts leading to the events in question were not disputed at trial. Soba was one of four persons who committed an armed robbery of Emmi's Tavern located at the corner of 39th Street and Second Avenue in Brooklyn, New York, in the evening of March 12, 1982 in front of more than 30 patrons. Plaintiff and at least one other accomplice were armed with sawed-off shotguns. The four robbers parked their car at 40th Street, near the corner of Second Avenue and walked to Emmi's Tavern. Plaintiff had his sawed-off shotgun in his belt in view of the patrons while he emptied the cash register. The other robbers kept the crowd under control or acted as lookouts.

Meanwhile, McGoey and Police Officer Blackwell ("Blackwell"), responding to a call of 'robbery-in-progress' arrived at 39th Street and Second Avenue in a police car. A robber exited the bar as they approached, dropped his shotgun after Blackwell fired two shots, and fled up Second Avenue. McGoey, in police uniform, chased the man up Second Avenue, while Blackwell called for assistance, and reported that shots had been fired. McComiskey, O'Brien and Langan heard the call "shots were fired" while their car was heading for 39th Street and Second Avenue in response to the 'robbery-in-progress' call.

Meanwhile, Soba, finding himself in the bar with his accomplices departed, took the money and exited the bar turning to his left and, grasping his sawed-off shotgun in both his hands, proceeded on the sidewalk up

Second Avenue towards 40th Street in an endeavor to get back to the car.

Near the corner of 40th Street, he came across McGoey who was looking for the robber who had preceded Soba to 40th Street and had turned the corner. Soba was admittedly carrying the sawed-off shotgun in plain view. He testified the gun was pointing past his shoulder, off to his left side, at a 45 degree angle upwards from a horizontal position. At this point, Blackwell shouted to McGoey to warn him of Soba's approach and that Soba was armed. McGoey heard Blackwell's shouting and turned to see Soba and the shotgun and fired six times in rapid succession, emptying his revolver. Soba did not fire his shotgun.

At or around the time McGoey and Soba confronted each other, McComiskey and O'Brien, in the car travelling down Second Avenue from 41st Street to 40th Street, saw

the confrontation, pulled over towards the sidewalk, jumped out of the car, and fired six and two shots, respectively, at Soba. Soba did not fire his gun. Of the fourteen shots fired by one or all the officers, Soba received six different wounds.

The Conflicting Testimony

The testimony at trial and the briefs on this motion conflict particularly on the sequence of events during the shooting.

Soba contends that McGoey started shooting at him, that he felt a bullet hit his stomach, at which he yelled, "Que pasa? I surrender," that he then felt a bullet hit him in his left hand (Transcript of Testimony ("Tr.") 73, 194), and/or his left shoulder, which turned him counterclockwise (Tr. 168) and, then, felt a bullet hit his right leg (Tr. 168).

He testified, "The Sergeant turned, and when he turned he shot me in the stomach.

. . . Then I said, 'Well, what's happening? I give up.' And that's when I felt the other shot in my hand that broke this, and then the ones in the back started shooting." (Tr. 73) He similarly testified that after the first officer shot him, "the other one started to shoot me, the ones behind" (Tr. 168).

McGoey testified that he fired six shots at Soba and had no idea whether he hit Soba (Tr. 228) but that while he was firing, Soba's upper body twisted to his right in the direction of McComiskey and O'Brien (Tr. 238). McGoey also testified that at some point Soba twisted to his right so that he was looking up 40th Street in the direction of 40th Street and Second Avenue; that "Simultaneously as I was firing I saw flashes out of the corner of my eyes, and I realized that the anticrime unit was there, Detectives McComiskey and O'Brien and

Langan had pulled up and were also firing." (Tr. 224).

McComiskey testified that he was in the right front passenger side of the unmarked police car driven by Officer Langan down Second Avenue at about 41st Street when he heard the radio call "shots were fired," that he drew his revolver, saw a flurry of activity in the corner of 40th Street and Second Avenue, that he saw the uniformed officer chasing an unknown male from 39th to 40th Streets along Second Avenue, and saw the unknown male make a left up onto 40th Street; that the car then made a screeching halt, that as McComiskey exited the car he saw Soba carrying the sawed-off shotgun come up and McGoey, who was at the building line, turn to face Soba and that he could see McGoey firing at Soba. At this point McComiskey testified that "Soba did a complete 90-degree turn and faced me. I

fired all six shots in my revolver." (Tr. 256-7).

McComiskey stated his reasons for firing were "Well, he was as close as you can get, I felt, to me, and when he turned in my direction and I seen that very large hole in that very large shotgun, I thought I was dead, and as I was firing my gun, I was waiting to see the flash from his gun." (Tr. 259)

McComiskey also testified that the split-second after McGoey stopped firing, he fired his six shots at Soba. (Tr. 263) McComiskey testified that all the shots were fired in a period of about four seconds. (Tr. 263).

O'Brien testified he was in the car with McComiskey and Langan and as the car approached 40th Street he saw McGoey and Soba pointing guns at each other about 8 to 10 feet apart; that as he exited the car

McGoey discharged his weapon at Soba; that at that point Soba turned and pointed the sawed-off shotgun in O'Brien's direction and he discharged two shots at which point Soba fell. (Tr. 298)

DISCUSSION

The standard for awarding judgment notwithstanding the verdict is the same as the standard applied to a motion for a directed verdict. Vander Zee v. Karabatsos, 589 F.2d 723 (D.C. Cir. 1978), cert. den., 441 U.S. 962 (1978). That standard is whether the evidence presented is such that, without the court weighing the credibility of the witnesses or considering the weight of the evidence, a reasonable person could have reached only one conclusion, different from that reached by the jury. Stubbs v. Dudley, 849 F.2d 83 (2d Cir. 1988), cert. den., 109 S. Ct. 1095 (1989); Bohack Corp. v. Iowa Beef

Processors, Inc., 715 F.2d 703 (2d Cir. 1983); Mattivi v. South African Marine Corp., "Huguenot", 618 F.2d 163 (2d Cir. 1980). The Court must view the evidence "in a light most favorable to the non-moving party (giving the non-movant the benefit of all reasonable inferences)" and considering whether "the jury's findings could only have been the result of sheer surmise and conjecture or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." Mattivi, supra, at 167-68.

The key evidence here is conflicting testimony as to the actual shooting which is difficult to reconcile. In considering it, however, the location of the building line in reference to the witnesses is important. Soba turned left out of the bar (Tr. 108-111) and up Second Avenue on the

sidewalk towards 40th Street. This puts the building line on his left. McGoey testified he was at the 40th Street and Second Avenue building line utilizing it for cover, looking around the corner down 40th Street (Tr. 234). Soba agreed that McGoey was located there (Tr. 71-73). McGoey's testimony made clear that, as he faced Soba, Second Avenue was to his left (jury box in relation to witness box in Courtroom 444), and that at the time of the shots Soba was "parallel to me" (Tr. 237). The testimony is uniform that the two men were 8 to 10 feet apart at the time of the shooting.

The significant difference in the testimony is that Soba claimed he turned counterclockwise, thus away from McComiskey and O'Brien, when the shot hit him in the shoulder (Tr. 168-69), whereas the police officers all testified that he turned

clockwise towards McComiskey and O'Brien. (Tr. 238, 257, 298).

Dr. William Stahl, Vice Chairman of the Department of Surgery at New York Medical College, testified that the hospital records showed that the plaintiff was injured by six bullets:

1. lower part of the thigh on the right leg;
2. upper part of abdominal wall in front (superficial);
3. through the left shoulder;
4. left forearm;
5. left forearm;
6. left forearm.

(Tr. 194)

The doctor's testimony did not corroborate the sequence of the shots. Because of the force of bullets from 8 to 10 feet away, however, the doctor's testimony did tend to corroborate Soba's testimony as

to how his body turned because four of the five bullets of a non-superficial nature hit him in the left side.

In the light of this evidence, the Court concludes the jury, while accepting McGoey's testimony that he fired in self-defense, rejected the testimony of McComiskey and O'Brien that they fired in self-defense. Since McComiskey and O'Brien did not testify that they were firing to protect McGoey and indeed, testified that Soba was threatening them and no longer facing McGoey, that issue need not be addressed in this opinion.

Having concluded that there was sufficient evidence for the jury to reject McComiskey and O'Brien's testimony that they fired in self-defense with Soba's sawed-off shotgun pointed at them, it was permissible for the jury to infer that their testimony was developed to cover a failure on their part to act properly. The jury

would also be entitled to make deductions about the use of excessive force, particularly if it concluded that Soba's back was to McComiskey and O'Brien, that he had been wounded at least three times by McGoey, and he had turned counterclockwise from McGoey and was no longer a threat to him. The jury had more than ample opportunity to assess Soba's credibility during his lengthy cross-examination. Under these circumstances, the Court may not usurp the jury's role of weighing the credibility of witnesses or the weight of the evidence presented. See Stubbs, supra.

In view of the jury's disbelief in the defendants' testimony and other evidence, the jury could have reasonably inferred that McComiskey and O'Brien acted maliciously or wantonly, with the result that defendants are not entitled to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 816-817

(1982). Furthermore, the award of no punitive damages does not vitiate that funding. Instead, it shows that the jury's determination was a deliberate one of awarding compensatory damages to a felon but nothing more.

Accordingly, the Court concludes there was sufficient evidence to support the jury's verdict and the motion for a directed verdict, for judgment notwithstanding the verdict and for a new trial is denied. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 697-98 (1962); Mattivi v. South African Marine Corp., "Huguenot", 618 F.2d 163 (2d Cir. 1980); Berner v. Commonwealth Pacific Airl., Ltd.,

346 F.2d 532, 535-36 (2d Cir. 1965), cert. den., 382 U.S. 983 (1966).

IT IS SO ORDERED.

Dated: New York, New York
October 17, 1990

ROBERT P. PATTERSON, JR.
U.S.D.J.

Copies of this Order sent to:

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OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK,
DATED MAY 9, 1990

CARLOS SOBA,

Plaintiff,

- against -

SGT. McGOEY; DET. McCOMISKEY, POLICE OFFICERS O'BRIEN, BLACKWELL, LANGAN, POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Defendants.

Motion granted on consent as to defendants Blackwell, Langan, Police Department and City of New York. Motion denied as to other defendants on grounds that issues of fact remain to be decided by a jury with respect to the reasonable use of force under the circumstances claimed by plaintiff. Plaintiff's credibility must be ascertained by a jury and not by the Court.

Robert P. Patterson, Jr.
U.S.D.J.

(3)

No. 91-308

Supreme Court, U.S.
FILED
SEP 18 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DETECTIVE McCOMISKEY and
POLICE OFFICER O'BRIEN,

Petitioners,

vs.

CARLOS SOBA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petitioners were entitled to qualified immunity notwithstanding the jury's determination that the Petitioners acted unreasonably and "maliciously or wantonly" when the Petitioners used excessive deadly force against Respondent Soba by shooting Soba repeatedly after Soba had (i) attempted to surrender; (ii) already been shot in the stomach by another officer; and (iii) offered no resistance to arrest.

2. Whether the evidence presented at trial, which consisted entirely of conflicting testimony, was such that, without weighing the credibility of the witnesses or considering the weight of the evidence, a reasonable person could have reached only one conclusion, that the Petitioners acted reasonably when they fired upon Soba.

COUNTERSTATEMENT OF THE CASE

The questions presented by the Petitioners are a thinly veiled attempt to convince this Court to overturn the factual determinations of a jury. Judge Patterson[1] recognized in his Opinion of October 17, 1990 denying the Petitioners motion for Judgment N.O.V., "the testimony at trial . . . conflict[ed] particularly on the sequence of events during the shooting." (15a). (Judge Patterson contrasts this conflicting testimony in his Opinion of October 17, 1990 at 15-19a.)[2] Since the evidence presented at trial rested entirely on the conflicting testimony of the parties, the lower courts properly denied Petitioners' request for Judgment N.O.V. *See Basham v. Pennsylvania Railroad Company*, 372 U.S. 699, 700-01 (1965).

Soba does not dispute in large part the statement of facts presented in Petitioners' brief; however, there are a number of crucial omissions, the most important of which is Petitioners' failure to acknowledge the discrepancies between their testimony and the testimony of Soba. These discrepancies can be summarized in four categories as follows:

(i) *Soba attempted to surrender.*

Soba testified that after McGoey fired a shot into his stomach Soba yelled, "Que pasa?, I surrender" (120, 176-80A). In contrast, Sergeant McGoey and Petitioner O'Brien testified that they did not hear Soba say anything (270, 298A).

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[1] "Judge Patterson" refers to the trial judge, the Honorable Robert P. Patterson, Jr.

[2] References to the Petition of Certiorari are abbreviated "Pet." Page references to the Appendix to Petition for A Writ of Certiorari are given in the form "__a" with the page number preceding. Page references to the Joint Appendix in the Court of Appeals are given in the form "__A" with the page number preceding.

(ii) *Soba never pointed the gun at any officer.*

Soba demonstrated to the jury that during the entire shooting he was holding the gun against his chest. This demonstration was described for the record by Judge Patterson as follows:

> The witness held his left hand in a position approximately the height of his shoulder with the elbow tucked into his side and his right hand at his right side, indicating that the gun was held in say a 45 degree angle from the lower chest area up to the shoulder on the left side, lower chest area on the right side of the shoulder area on the left side.

(117A)

In response to Judge Patterson's questioning, Soba indicated that the barrel of the gun was slightly above his left shoulder (117-18A). Soba testified that he continued to hold the gun this way while Sergeant McGoey and the Petitioners fired their shots (120-22, 214A). In contrast, the Petitioners testified that once McGoey finished shooting all six shots in his gun at Soba (309A), Soba "whipped" around and pointed the gun at the Petitioners (303, 307, 343A).

(iii) *When McGoey shot Soba, Soba turned away from the Petitioners.*

Soba testified that after he was first shot in the stomach and the left shoulder, he turned counterclockwise (214-15A). In contrast, the Petitioners each testified that Soba turned toward the officers (303, 307, 343A). However, as was demonstrated to the jury at trial and recognized by Judge Patterson in his October 17, 1990 Opinion, in order for Soba to turn toward the Petitioners he would have had to turn clockwise (21-23a).

Whether Soba turned clockwise or counterclockwise after McGoey's gun shots struck him in the stomach and left shoulder is critical. If Soba turned clockwise as the Petitioners and McGoey testified, Soba would have been turning toward the

Petitioners when they fired. However, if Soba turned counterclockwise then he was turning away from McGoey and the Petitioners when the Petitioners shot.

Recognizing this distinction Judge Patterson wrote in his Opinion of October 17, 1990 as follows:

> The jury would also be entitled to make deductions about the use of excessive force, particularly if it concluded that Soba's back was to McComiskey and O'Brien, that he had been wounded at least three times by McGoey and was no longer a threat to him. The jury had more than ample opportunity to assess Soba's credibility during his lengthy cross-examination. Under these circumstances, the court may not usurp the jury's role of weighing the credibility of witnesses or the weight of evidence presented. *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988); *cert. den.*, 489 U.S. 1034 (1989).

(19-20a)

(iv) *Petitioners failed to provide a credible explanation for shooting Soba.*

The reasonable police officer is expected to provide an explanation each time he discharges his weapon in the line of duty. The Petitioners' failure to provide a credible explanation for shooting Soba is another factor indicating that they acted unreasonably.[3]

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[3] The Petitioners contend that the "subjective motivations" of the Petitioners were improperly put in issue when Judge Patterson noted that the jury could draw inferences from the Petitioners failure to provide a credible explanation for firing upon Soba. Pet. 30-32. However, this Court has recognized that in order to make the "objective legal reasonableness" determination required in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court will often need to examine the information possessed by the police themselves. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Moreover, it was the Petitioners that put their "subjective motivations" in issue:

(Footnote continued)

Petitioner McComiskey testified that he saw Soba extending the gun toward Sergeant McGoey in what he described as a "firing position" (303A), and that after McGoey fired the six shots in his gun, Soba "did a complete 90-degree turn" and faced McComiskey (303A). McComiskey fired all six shots in his gun, (Id.) testifying that he didn't begin to fire until McGoey "stopped firing" (309A).

Similarly, Petitioner O'Brien testified as follows:

> As I exited the car, Sergeant McGoey discharged his weapon at Soba. At that point Mr. Soba turned in my direction, I yelled for him to drop the gun, and he had – seemed to be bringing it up higher when he turned towards me. I discharged two shots at Mr. Soba, at which point he fell.

(343A)

The picture that the Petitioners painted for the jury was that Soba had the "drop" on Sergeant McGoey (283A), yet did not fire (284A), which caused Sergeant McGoey to fire six shots (283A) at least two of which struck Soba (212-14A) one each

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[Petitioner's Counsel] Q. What were your reasons for firing at Carlos Soba that evening?

[McComiskey] A: Well he was as close as you can get, I felt, to me and when he turned in my direction and I seen that large hole in that very large shotgun, I thought I was dead, and r I was firing my gun I was waiting to see the flash from his gun (305A).

Similarly, Petitioner O'Brien testified on direct examination that he fired because Soba turned toward him and was bringing the gun up to fire (343A). The jury has since rejected the "subjective motivations" offered as evidence by the Petitioners, leaving the Petitioners now to contend that the district court should be faulted for recognizing that the jury could draw negative inferences from the lack of credibility of the Petitioners.

in the stomach (120A) and the shoulder (214-15A). Soba, wounded, then purportedly "whipped" around (307A) and pointed his gun at the Petitioners (303, 307, 343A) which caused the Petitioners to fire a total of eight times (308, 344A). Once again Soba did not fire a shot (354A).

The jury rejected the Petitioners' testimony. The fact that the Petitioners were unable to provide a credible explanation for the shooting is certainly a factor the jury may consider in evaluating the reasonableness of the officers' conduct.[4]

(v) *The evidence supports the jury verdict.*

If the evidence is viewed in the light most favorable to the verdict winner, Soba, it is apparent that there is an evidentiary basis for the jury's determination that the Petitioners acted unreasonably. After McGoey's first shot hit Soba in the stomach, Soba shouted "Que pasa, I surrender" (120, 176-80A). Soba was then hit with a bullet in the shoulder which caused him to turn counterclockwise (214-15A), away from the officers. Soba, wounded and attempting to surrender, continued to hold the gun against his chest while the Petitioners fired eight more shots (120-22, 214A). The Petitioners' explanation for why they shot Soba, that they fired in self defense, was rejected by the jury.

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[4] Judge Patterson found that there was sufficient evidence to allow the jury to reject the Petitioners' testimony and therefore "it was permissible for the jury to infer that their testimony was developed to cover a failure on their part to act properly" (23a). Although this inference was not necessary for the jury to determine that the Petitioners acted unreasonably, it is certainly an inference the jury logically could have drawn from the Petitioners' inability to provide a credible explanation for shooting Soba.

Reasons for Denial of the Writ

I. THE PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY

A. *All New York City Police Officers Should Know that the Use of Excessive Deadly Force Is Unconstitutional*

The Petitioners contend that even though the jury found that their shooting of Soba was unreasonable and malicious, they were "entitled to qualified immunity as a matter of law." Pet. at 27. However, this Court has held that a government actor is entitled to qualified immunity only "insofar as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, or, where the rights were clearly established, insofar as it was objectively reasonable for the officer to believe that his acts did not violate those statutory or constitutional rights. *Anderson*, 483 U.S. at 640.

The Petitioners fail to meet either standard. "The right of an individual not to be subjected to excessive force has long been clearly established." *Calamia v. City of New York*, 879 F.2d 1025, 1036 (2d Cir. 1989) Thus, the question before the Second Circuit was whether it was "objectively reasonable" for the Petitioners to believe that their treatment of Soba did not violate that right. As this Court stated in *Harlow*:

> If the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct.

457 U.S. at 818-19.

This was precisely Judge Patterson's reasoning in denying the Petitioners qualified immunity argument at Summary Judgment:

> All New York City Police Department Officers should know that the use of excessive deadly force is unconstitutional. The question is whether or not the defendants should have known from their positions during the apprehension of [Soba] that the force they were utilizing was excessive.

(41-44A)

The Petitioners apparently recognize this flaw, for they now contend that even if their conduct was excessive under current-day standards set out in *Tennessee v. Garner*, 475 U.S. 1 (1985), their conduct was justified under pre-*Garner* standards. Pet. at 39-42. Although they offered no such evidence at trial, Petitioners now contend that they were relying on N.Y. Penal Law 35.30 or 35.15, the operative provisions at the time of the shooting, and that the shooting was justified since they "had objective reasonable cause to fear serious physical harm from an armed felon." Pet. at 42.[5] The Petitioners' argument fails for two reasons. First, the jury implicitly found that the Petitioners did not have "objective reasonable cause to fear serious physical harm from [Soba]." Second, *Garner* is to be applied retroactively, and thus N.Y. Penal Law 35.30 or 35.15 has limited, if any, relevance. *See Davis v. Little*, 851 F.2d 605, 608-09 (2d Cir. 1988).

The Petitioners also contend that "there is a conflict among the Circuits as to whether qualified immunity is ultimately a legal determination for the Court, or an issue to be submitted to and resolved by the jury." Pet. at 33-34. However, this issue was not determinative in the instant matter. Judge Patterson denied Petitioners qualified immunity defense when he denied their motion for (i) summary judgment (27a), (ii) a stay of trial pending appeal (41-44A), and (iii) Judgment N.O.V., directed verdict or a new trial (10-26a).

Moreover, Judge Patterson recognized that despite Petitioners' repeated attempts to convince the district court to grant qualified

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[5] The Petitioners offered no evidence that they were relying on N.Y. Penal Law 35.30 or 35.15 at trial, contending instead that they shot Soba because he was pointing a gun at them (284, 303, 343A). The jury rejected this argument.

immunity, the Petitioners could later contend that the jury should have made this determination. Therefore, Judge Patterson offered Petitioners the opportunity to fashion a qualified immunity special interrogatory, an opportunity of which Petitioners failed to take advantage (338-39A). Having failed to prepare a special interrogatory requesting whether the jury would have granted qualified immunity, the Petitioners should not be granted certiorari on the speculation that the jury may have granted qualified immunity.[6]

II. THE PETITIONERS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THERE WAS AN EVIDENTIARY BASIS FOR THE JURY'S DETERMINATION THAT THE PETITIONERS ACTED UNREASONABLY

The Petitioners contend that certiorari should be granted because the jury's verdict was against the weight of the evidence and that they were entitled to a Judgment N.O.V. Pet. at 54-55. However, it is the long settled practice of this Court to refuse to grant certiorari to review evidence and discuss specific facts. R. Stern & E. Gressman, *Supreme Court Practice* at 217 (6th ed. 1986); *Graver Tank & Mfg Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this court, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). Accordingly, the Petitioners' request for this Court to grant certiorari to review the facts of the case should be denied. However, as is demonstrated below, even if this Court did review the facts, such a review would not warrant disturbing the jurys' verdict.

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[6] Even if the Petitioners had fashioned a special interrogatory for the jury, it is highly doubtful that the jury's response would have been favorable to the Petitioners, since the jury not only found that the Petitioners acted unreasonably, but also found that they acted "maliciously or wantonly." (142A)

A. *The Court Must View the Evidence in the Light Most Favorable to Soba*

In reviewing the District Court's denial of a Judgment N.O.V., the appellate court must view "the evidence in the light most favorable to the party against whom the motion was made, and that party must be given the benefit of all reasonable inferences that might have been drawn in his favor from the evidence." *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 712 (2d Cir. 1983); *Stubbs v. Dudley*, 899 F.2d 83 (2d Cir. 1988), *cert. denied*, 484 U.S. 1034 (1989).

Since the evidence presented at trial concerning the reasonableness of the Petitioners' conduct rested entirely on the conflicting testimony of the parties, the District Court correctly denied Petitioners' request for Judgment N.O.V. *See Basham*, 372 U.S. at 700-01.

B. *The Witnesses' Conflicting Testimony Must Be Resolved In Favor of Soba*

At trial the parties presented conflicting testimony on a number of issues crucial to the determination of the reasonableness of the Petitioners' firing upon Soba. The jury weighed the credibility of the witnesses and the plausibility of the testimony and chose to believe Soba. An appellate court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury. *See Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112 (2d Cir. 1984).

It is not within this Court's authority "to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury." *Basham*, 372 U.S. at 700; *Atlantic and Gulf Stevedores, Inc. v. Ellerman Cines, Ltd.*, 369 U.S. 355, 359-60 (1962) ("neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them"). This Court's province is to determine if there was an evidentiary basis for the verdict. *Basham*, 372 U.S.

at 700. In making this determination the Court must resolve all issues of credibility in favor of the verdict winner [Soba] and draw all reasonable inferences from the evidence viewed in the light most favorable to the verdict winner. *See Gehrhardt v. General Motors Corp.*, 581 F.2d 710 (2d Cir. 1978).

C. *There Was an Evidentiary Basis for the Jury's Determination that the Petitioners Acted Unreasonably*

Whether the Petitioners utilized excessive force in violation of the Fourth Amendment is determined by an objective reasonableness standard based upon the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386 (1989). The determination of "reasonableness" is a question of fact for the jury. *Powell v. Gardner*, 891 F.2d 1039, 1043-44 (2d Cir. 1989).

The key evidence in this case was the conflicting testimony as to the actual shooting. This evidence, viewed in the light most favorable to the verdict winner (Soba), and giving the verdict winner all reasonable inferences, indicates that after McGoey's first shot hit Soba in the stomach, Soba shouted "Que pasa, I surrender" (120, 176-80A). McGoey then discharged the remaining bullets in his gun. Soba, wounded and attempting to surrender, continued to hold the gun against his chest as the Petitioners fired eight more shots (120-22, 214A). The only explanation offered by Petitioners for firing upon Soba, that they fired in self defense, was rejected by the jury.

CONCLUSION

It is respectfully submitted that Petitioners have failed to sustain their burden of establishing that there are special and important reasons why the Writ of Certiorari should be granted. The decision below does not conflict with any decision of another Circuit, or of this Court. As the decisions of the Second Circuit and the District Court correctly apply principles previously articulated by this Court, it does not involve any important question of federal law which has not been, but should be, settled by this Court. Accordingly, Petitioners have not shown any reason why this Court should exercise its sound judicial discretion to entertain this case.

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September 17, 1991

Respectfully Submitted,

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